Lee Giok Tee @ Lee Kim Hong v Pallian a/l Arumugaperumal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–21 OF 1996
ABDUL AZIZ MOHAMAD, MOHD GHAZALI JJCA AND RAMLY ALI J
17 FEBRUARY 2006

Civil Procedure — Service — Originating summons — Appellant did not receive notice of the hearing — Whether certificate of posting sufficient — Whether sufficient to raise the presumption as to the effecting of service and the time when service is effected

The respondent bought the appellant's land at a statutory sale by public auction under the National Land Code conducted on 29 November 1993, pursuant to an order for sale dated 20 August 1991. Unable to obtain possession of the land from the appellant, the respondent filed in the High Court an application by originating summons under O 89 of the Rules of the High Court 1980 for an order for possession. The originating summons was heard on 11 August 1994, in the absence of the appellant. An order for possession was granted on that day. It was also ordered that damages for the respondent be assessed by the Deputy Registrar. On 28 October 1994, the appellant filed a summons in chambers seeking an order setting aside the orders of 11 August 1994, and consequential and ancillary orders. On 29 September 1995, the appellant's application was dismissed with costs. The appellant appealed to this court. The main contention was that the appellant was not given notice of the hearing of the originating summons on 11 August 1994. The respondent averred by affidavit that Krishnan Papoo and Associates had, by a letter dated 6 August 1994, for which a certificate of posting was obtained, informed the appellant of the date.

Held, allowing the appeal:

(1) The court did not think that the letter by the solicitors could realistically be treated as a notice sent from an office of the High Court. Neither could the solicitors be treated as the agent of the High Court. The deputy registrar merely informed the solicitors of the date and left it to them, as a duty of the solicitors for the respondent, to inform the appellant. Further and in any case, the last sentence of O 62 r 11 seems to have the effect of neutralizing any presumption that the rule may carry if the party concerned categorically denies service, as the appellant did, for that is the only way available to him by which to establish that he has not been served. The respondent's counsel did not mention any other presumption that exists in the respondent's favour (see para 8)

(2) Since there was no proof of actual service, the respondent had to rely on some presumption of service, and none had been shown by the respondent to exist for a letter posted with the support of a certificate of posting. Even if O 62 r 6(1) were to allow or require service by post, without specifying registered

post, it had to be by registered post, and only then will there be a presumption as to the effecting of service and the time when service was effected. This is provided by s 12 of the Interpretation Acts 1948 and 1967 (see para 9).

(3) As to costs, the judge set aside the order for costs made by the High Court, but the judge ordered that the costs of this appeal and in the High Court followed the event of the originating summons, ie whoever wins on the originating summons will get his or her costs of this appeal and of the setting-aside application in the High Court. That was because the judge did not think it fair that if the respondent should succeed on his originating summons, he should bear the appellant's costs in the High Court and of this appeal, since in the matter of service, and, more importantly, in the matters that the appellant had raised as to merits, the court was unable to see that the respondent, who was just a buyer at an auction sale, was personally blameworthy (see para 12).

[Bahasa Malaysia summary

Responden membeli hartanah perayu di satu lelongan awam berkanun di bawah Kanun Tanah Negara 1965 yang diadakan pada 29 November 1993, dalam melaksanakan satu perintah penjualan bertarikh 20 Ogos 1991. Oleh kerana tidak dapat mengambil milikan tanah tersebut daripada perayu, responden telah memfailkan satu saman pemula di Mahkamah Tinggi di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mengambil milikan. Saman pemula tersebut didengar pada 11 Ogos 1994 dengan ketidak hadiran perayu. Satu perintah milikan diberikan pada hari itu. Satu perintah untuk gantirugi juga diberikan kepada responden untuk ditaksirkan oleh timbalan pendaftar. Pada 28 Oktober 1994, perayu memfailkan satu saman dalam kamar memohon satu perintah untuk mengetepikan perintah-perintah bertarikh 11 Ogos 1994 tersebut dan perintah-perintah sampingan dan berbangkit. Pada 29 September 1995, permohonan perayu diketepikan dengan kos. Perayu merayu ke mahkamah ini. Perbalahan utama ialah bahawa perayu tidak diberikan notis tarikh pendengaran saman pemula 11 Ogos 1994 tersebut. Responden menyatakan dalam afidavit mereka bahawa Krishnan Papoo & Associates telah, melalui satu surat bertarikh 6 Ogos 1994, di mana satu sijil pengeposan telah diperolehi, memberitahu perayu akan tarikh tersebut.

Diputuskan, membenarkan rayuan:

(1) Mahkamah tidak berpendapat bahawa surat daripada peguamcara tersebut boleh dikatakan sebagai satu notis yang dihantar dari pejabat Mahkamah Tinggi. Peguamcara juga tidak boleh dikatakan agen Mahkamah Tinggi. Timbalan pendaftar hanya setakat memberitahu peguamcara akan tarikh tersebut dan membiarkan mereka, sebagai kewajipan peguamcara kepada responden, untuk memaklumkannya kepada perayu. Selanjutnya dan dalam apa jua kes, ayat terakhir A 62 k 11 mempunyai efek meneutralkan segala anggapan kaedah kemungkinan terpakai sekiranya pihak berkenan menafikan secara mutlak penyampaian, seperti perayu di sini, oleh kerana itu merupakan cara tunggal yang menyatakan tiada penyampaian dibuat kepadanya.

Peguamcara responden tidak menyatakan terdapat apa-apa anggapan yang memihak kepada responden (lihat perenggan 8).

(2) Oleh kerana tiada bukti penyampaian sebenarnya, responden terpaksa bergantung kepada anggapan penyampaian, dan responden tidak dapat menunjukkan sebarang anggapan penyampaian untuk surat yang dikirimkannya dengan disokong oleh sijil pengeposan. Walaupun A 62 k 6(1) membenarkan atau mengkehendaki penyampaian secara pos, tanpa menyatakan secara khususnya pos berdaftar, ia semestinya dengan pos berdaftar, baru anggapan penyampaian dapat dibuat dan pada masa bila penyampaian dibuat. Ini adalah seperti dinyatakan oleh s 12 Akta-Akta Tafsiran 1948 dan 1967 (lihat perenggan 9).

(3) Berhubung dengan kos yang diperintahkan oleh Mahkamah Tinggi, hakim telah mengetepikan kos tersebut, tetapi hakim memerintahkan kos rayuan ini dan juga di Mahkamah Tinggi adalah kos dalam kausa saman pemula, iaitu, sesiapa yang menang saman pemula akan dapat kos rayuan ini dan juga kos mengetepikan permohonan di Mahkamah Tinggi. Ini disebabkan hakim berpendapat ia tidak adil jika responden berjaya dalam saman pemulanya, beliau terpaksa menanggung kos perayu ke Mahkamah Tinggi dan juga rayuan ini, oleh kerana dalam perkara penyampaian, dan lebih pentingnya, dalam perkara di mana perayu bangkitkan berhubung dengan merit kes ini, mahkamah tidak dapat lihat bahawa responden, yang merupakan pembeli di suatu lelongan jualan, dapat dipersalahkan (lihat perenggan 12).]

Notes

For a case on service of originating summons, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 5532.

Legislation referred to

Interpretation Acts 1948 and 1967 s 12
National Land Code 1965
Rules of the High Court 1980 O 28 r 5(2), O 62 r 6(1), O 62 r 11, O 89

Appeal from: Originating Summons No S2–24–417 of 1994 (High Court, Kuala Lumpur)

Richard WG Lee (EL Teh with him) (Cheah Teh & Su) for the appellant.
Vengetraman Manickam (Jayaratnam & Chong) for the respondent.

Abdul Aziz Mohamed JCA (delivering judgement of the court):

[1] The respondent bought the appellant's land at a statutory sale by public auction under the National Land Code 1965 conducted on 29 November 1993, pursuant to an order for sale dated 20 August 1991. The appellant had charged the land to a bank as security for a loan to a company. Unable to obtain possession of the land from the appellant, the respondent filed in the High Court an application by originating summons under O 89 of the Rules of the High Court 1980 for an order

for possession. The originating summons was heard on 11 August 1994, in the absence of the appellant. An order for possession was granted on that day. It was also ordered that damages for the respondent be assessed by the deputy registrar. A

[2] On 28 October 1994, the appellant filed a summons in chambers seeking an order setting aside the orders of 11 August 1994, and consequential and ancillary orders. On 29 September 1995, the appellant's application was dismissed with costs. The appellant appealed to this court. As the learned judge has not prepared her grounds of decision, we have not had the benefit of knowing the views that she took, in dismissing the application, of the matters that were raised by the appellant in support of her setting-aside application. B C

[3] In this appeal, the appellant has raised ten grounds for contending that the appeal should be allowed and the orders for possession and damages should be set aside. The first ground is that the appellant was not given notice of the hearing of the originating summons on 11 August 1994. If the appellant succeeds on the first ground, the orders made on 11 August 1994, have to be set aside *ex debito justiciae*, that is to say, without having to consider the merits of the question whether the respondent was otherwise entitled or not entitled to the order for possession. The second to the seventh grounds relate to alleged defects in the process of the auction and the statutory sale of the land and are designed to show that there are triable issues that pose a challenge to the validity of the respondent's title to the property and, consequently, to his locus standi to resort to proceedings under O 89 to obtain possession of the property. It may be mentioned in this connection that on 14 December 1994, about two months after the appellant, as she claimed, first knew about the orders of 11 August 1994, and during the pendency of her setting-aside application, the appellant filed a writ action in which, among other things, she sought to invalidate the charge and the sale by auction. The eighth ground questions the validity of the orders made on 11 August 1994, by reason that they included an order for damages which it is contended cannot be made in an O 89 application. The ninth and tenth grounds contend that in any case O 89 cannot be resorted to, to obtain possession from a person, such as the appellant, who previously was the lawful owner of the property. The second to the tenth grounds are therefore grounds that go to the merits of the appellant's setting-aside application. D E F G

[4] The facts relating to the first ground are as follows. Originally, the date of hearing of the respondent's originating summons was 8 July 1994. On that date the appellant and her son went to the court for the hearing but was informed by an officer in his chambers, in which the respondent's counsel, En Krishnan Papoo, was also present, that the hearing was adjourned to some other date which would be notified to the appellant. This was averred by the appellant in her affidavit and there was no denial by the respondent of the appellant's statement of being present in the officer's chambers with En Krishnan Papoo on that date. So it has to be accepted as true that the appellant did go to court for the hearing on 8 July 1994. On 6 August 1994, a Saturday, the Deputy Registrar wrote to the respondent's then solicitors, Krishnan Papoo and Associates, informing them of the new date of hearing, 11 August 1994, a Thursday, and asking them to inform the appellant of the date. H I

[5] In response to the appellant's averment by affidavit that she was never informed of the date of hearing, the respondent averred by affidavit that Krishnan Papoo and Associates had, by a letter dated 6 August 1994, for which a certificate of posting was obtained, informed the appellant of the date and forwarded a copy of the court's letter. The respondent exhibited a copy of the solicitors' letter and the certificate of posting. But the appellant responded by maintaining that she never received any notice of hearing. There was no actual proof that the appellant did receive the solicitors' letter.

[6] Learned counsel for the appellant's argument in this appeal relied on law and fact. On the law, he said that if at all notification of the date of hearing was to be by post, according to O 62 r 6(1)(b) of the Rules of the High Court 1980, service of the solicitors' letter may be effected only 'by prepaid registered post', which posting supported by a certificate of posting is not. As the appellant had pointedly denied receiving the letter and as there was no proof of actual receipt of it, the respondent, it was argued, had to rely on some presumption of receipt, but there was none in respect of a letter posted with the support of a certificate of posting, unlike the case of a registered letter, for which a presumption is provided by s 12 of the Interpretation Acts 1948 and 1967. So the evidence of posting, it was argued, does not constitute proof that the appellant received the solicitors' letter.

[7] On the factual side, the appellant's counsel argued that if the appellant had received the notice of the date of hearing, it was improbable that she would not have attended the hearing in view of the fact that she had gone to court on the earlier date and the fact that she had on 27 January 1992, paid the bank RM120,000 to settle the debt of about RM140,000. It is a fact that the principal amount of the loan, which was an overdraft, was RM120,000 and that on 31 August 1990, which was about a year before the order for sale, the amount owing to the bank was RM122,753.34. The payment of RM120,000 on 27 January 1992, was averred in para 26 of the appellant's affidavit dated 10 November 1994. The averment was not disputed. 27 January 1992, was about five months after the order for sale and almost two years before the sale. It was argued that, the appellant having paid so much, it would not be logical, if she knew of the hearing date, that she did not take an interest in the property by attending court to oppose the respondent's endeavour to obtain possession of the property.

[8] In his reply, learned counsel for the respondent cited O 62 r 11, which allows notices sent from any office of the High Court to be sent by post. It provides as follows:

> 11. Notices sent from any office of the High Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service. But nothing in this rule shall prevent any party from establishing, if such be the case, that he has not been so served.

We understand counsel to be saying that O 62 r 11 should apply in this case on the basis that, since the solicitors were asked by the court to notify the appellant, their letter should be treated as a notice sent from an office of the High Court. That, in

our opinion, cannot be done, because under O 28 r 5(2), the duty to give the notice was the respondent's. The rule provides as follows:

> (2) if the hearing of a summons is adjourned generally, the party on whose application the day for its hearing was fixed under rule 2 may restore it to the list on two days' notice to all the other parties...

In any case, we do not think that the letter by the solicitors can realistically be treated as a notice sent from an office of the High Court. Neither can the solicitors be treated as the agent of the High Court. The deputy registrar merely informed the solicitors of the date and left it to them, as a duty of the solicitors for the respondent, to inform the appellant. Further and in any case, the last sentence of O 62 r 11 seems to have the effect of neutralizing any presumption that the rule may carry if the party concerned categorically denies service, as the appellant did, for that is the only way available to him by which to establish that he has not been served. The respondent's counsel did not mention any other presumption that exists in the respondent's favour.

[9] We agree with the appellant's counsel that service on the appellant has not been proved. Since there is no proof of actual service, the respondent has to rely on some presumption of service, and none has been shown by the respondent to exist for a letter posted with the support of a certificate of posting. Even if O 62 r 6(1) were to allow or require service by post, without specifying registered post, it has to be by registered post, and only then will there be a presumption as to the effecting of service and the time when service is effected. This is provided by s 12 of the Interpretation Acts 1948 and 1967, which says:

> 12 Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service —
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

[10] Apart from absence of proof of service, we also agree with the appellant's counsel that in view of the two factors mentioned earlier, the probability is that the appellant did not receive the solicitors' letter. If she did, it is not probable that she would not have attended court on 11 August 1994, to resist the taking over of possession of the property that she was resolved to retain as hers, the more so since she did attend on the previous occasion.

[11] For that reason, we allow the appeal and set aside the orders made on 11 August 1994. It is not necessary to consider the merits of the appellant's opposition to the originating summons. There will have to be an inter partes hearing of the originating summons at which the appellant will have an opportunity to present the merits of her case. That, from what her counsel said in his oral submission, is what she desires.

[12] As to costs, we set aside the order for costs made by the High Court, but we order that the costs of this appeal and in the High Court follow the event of the originating summons, that is to say, whoever wins on the originating summons will get his or her costs of this appeal and of the setting-aside application in the High Court. That is because we do not think it fair that if the respondent should succeed on his originating summons, he should bear the appellant's costs in the High Court and of this appeal, since in the matter of service, and, more importantly, in the matters that the appellant has raised as to merits, we are unable to see that the respondent, who was just a buyer at an auction sale, was personally blameworthy.

[13] We also order that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Sally Kee